Supreme Court, U.S.
FILED
MAY 8 2003
OFFICE OF THE CLERK

No. 02-1141

IN THE

Supreme Court of the United States

TA CHEN STAINLESS STEEL PIPE, LTD.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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On January 21, 2003, Petitioner Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen") filed a petition ("Petition") seeking certiorari review by this Court of a divided opinion of the Federal Circuit. In April 2003, the U.S. Government replied ("Gov't Br.") in a way that highlights "facts" that are neither fairly presented nor germane to the important questions presented here that the Government does not address.

I. The Majority Opinion Below Is Seriously Erroneous as a Matter of Trade and Administrative Law, With Major International Repercussions If Not Corrected, Warranting this Court's Review

The issue here warrants this Court's review because (a) the interpretation of trade statutes that allow tariff increases is of international importance, including as to U.S. trade and export interests, and (b) the decision below conflicts directly with rulings of this Court limiting the authority of judges to augment agency discretion in ways Congress did not statutorily authorize.

All agree that, in 1995, the Congress narrowed U.S. trade law to bring the United States into compliance with its international obligations. *See, e.g.*, Gov't Br. 2, 8. A stated priority of the United States was to build a world rule of law to ensure that other nations will not misuse their trade laws -- e.g., anti-dumping laws imposing anti-dumping duties on unfairly low priced (dumped) imports -- to the prejudice of U.S. exporters and the general belief that international application of rule of law principles is critical to world trade and economic development. Petition at 18. International trade now accounts for over a third of the total U.S. economy. Access to foreign markets and foreign goods are critical to the success of our way of life.

To that end, and pursuant to international agreement, the Congress narrowed the U.S. anti-dumping statute to provide that anti-dumping officials may impose duties for deemed unfairly low priced imports based on adversely estimated facts available (penalty duties) only if an exporter makes less than its best effort to answer a request for information from the U.S. Department of Commerce ("DOC") charged with administering the law. See 19 U.S.C. § 1677e(b), Uruguay Round Agreements Act ("URAA").[1] Accord: Gov't Br. at 2-3, 8.

It is undisputed (including in the Government's Brief in Opposition) and is the law of this case, that, at the time of DOC's request of Ta Chen for certain data of a customer of Ta Chen (Sun Stainless, Inc.), Ta Chen:

- did not have such data (the customer did),
- had done nothing to destroy it,
- had no affiliation with (or control over) the owner of the Sun data,
- could not obtain such data from the owner of the Sun data even using best efforts,
- could not have known in advance that the owner of the Sun data would not cooperate to provide it when asked to do so, and

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[1] Pub. L. 103-465, § 231(c), 108 Stat. 4896.

- until it was requested, reasonably did not think the data needed to be provided. It was only after a change in law and implementing clarifying regulation and DOC's explicit request that the need was clear.

Petition App. 5a-6a, 10a-12a, 19a, 24a-29a, 33a-34a, 58a-59a, 66a.

The Government argues that "imposing a duty to preserve" data prior to a request for it in a trade proceeding is compatible with the statutory language and purpose of the URAA. But, as noted above, that law states that best efforts to provide information must be used only in response to an actual request for information in a proceeding. The Government cites no contrary authority, as none exists. The Government does cite *Allied-Signal Aerospace Co.* v. *United States*, 966 F.2d 1185 (Fed. Cir. 1993). But that case, decided under *pre*-URAA law, merely held that DOC *then* had wide discretion to decide when to impose adverse inference tariff rates.

The Federal Circuit dissent by Judge Gajarsa below notes that the URAA language is not susceptible to the Government's interpretation. Petition App. 34a. As the dissent correctly states, the issue before this Court is novel -- i.e., judges ignoring the narrowed terms of a key U.S. trade statute designed to restrict the grounds on which to impose penalty tariffs in antidumping investigations. *Id.* As the dissent continues, the statute cannot be read to authorize penalty tariffs for failure to obtain and preserve documents of a third-party who was sold before such documents were even requested, with the new owner proving not cooperative. See Petition App. at 32a-33a. The Government never comes to terms with this argument in its brief in opposition.

The Government argues (Gov't Br. in Opp. at 7) that the decision below does not contravene rulings of this Court. In fact, it does. This Court has repeatedly held that a U.S. agency may not exploit statutory silence to exercise powers not given it. "An agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986). This Court stated "that [to] supply omissions [within a statute] transcends the judicial function." *W. Va. Hosps. Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250, 250-51 (1926)). The principles of the *La. Pub. Serv. Commn* and *W. Va. Hosp.* decisions apply to the enforcement of U.S. trade (e.g., anti-dumping) statutes. *FAG. Italia v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002).

An even stronger basis for Supreme Court review and discipline exists here than in the cases cited above. The U.S. statute authorizing DOC to impose penalty import tariffs was narrowed by Congress in the URAA in response to international criticism that DOC's discretion was too broad and unfettered, and was being abused for protectionist purposes (criticism effectively acknowledged in the Gov't Br. in Opp. at 2 & 8-9). Petition at 16-17.

Without statutory support, the Government assumes that a duty to preserve information in the possession of a third party can exist, and indeed, before there is a DOC request for the information. Moreover, the Government argues (at 6) the trade community (producers, exporters, traders and importers) should "bear the risk" that documents of those with whom they do business will be requested and may be unobtainable. The Government urges that the law compels those in the trade community to obtain and keep all records of third parties with whom they've done business, under threat of penalty tariffs should the information ever be

requested. The Government does not assert that a failure to do so has ever been recognized as justification for penalty duties.

As the dissent below stresses, not only is requiring such foresight unfair and unrealistic, the URAA does not make such risk shifting a ground for imposing penalty tariffs. The crucial fact is that the 1995 URAA does not say that penalty import tariffs may be imposed for failure to retain control of documents that, as here, might subsequently be deemed relevant due to a change in law and its application. It says only that *after* a request is made, it must be answered to the best of one's ability.

As to the second main issue of our Petition -- i.e., the selection of a penalty tariff rate -- the Government argues (at 6) that the penalty dumping margin for alleged sales below fair value selected is permissible because it is based on one fact in the record, plus adverse inferences from not providing requested information. Yet the Government ignores the URAA statutory requirement implementing U.S. international WTO obligations that use of penalty facts available must still be based on "probative" estimates based on the record as a whole as to the actual amount of dumping (i.e., sales below fair value). Petition at 13 & 15. The Government's position that these statutory requirements imposed by Congress may be ignored is wrong. Indeed, the Government admits (Gov't Br. 3, 9) that under the statute adverse inferences may be used only to the extent of insuring that a party does not get a more favorable result by not cooperating than by cooperating, effectively admitting that the adverse inference must consider reality as to the actual amount of dumping. Yet again, the Government and the lower courts depart from the rule of law Congress held to be key to the administration of U.S. trade laws and that Congress sought internationally from U.S. trading partners as

to the regulation of international trade, including U.S. exports.

Finally, the Government misconstrues our argument as to U.S. international WTO obligations. We are not claiming a WTO violation as a basis for our Petition, as the Government says on page 7. Rather, our argument is that U.S. statutory language intended to implement U.S. international WTO obligations -- i.e., a Congressional intent the Government admits on pages 2, 8 and 9 of its opposition -- is violated. The Government repudiates two centuries of doctrine of this Court beginning with *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804), that, where possible, a statute must be construed to conform to the international obligations assumed by this country.

The record of the United States in international dispute resolution procedures of the WTO is a sorry one. Since the creation of that body in 1995, the United States has lost 22 out of the 25 cases brought by other countries against the United States and decided to date. Malawer, *The U.S. and the WTO, Lessons Learned for Trade Litigations and Global Governance*, Virginia Lawyer 12, 18 (April 2003). The majority of these adverse decisions turn on the United States' administration of its U.S. anti-dumping statute. *Id.* Nothing is more antithetical to WTO/GATT free trade principles than imposition of high tariffs as a punishment rather than a reflection of actual pricing patterns and rule of law principles. A decision of this Court is far more likely to have a sobering effect on American administrators and lower court judges than will the repeated negative findings of international WTO panels.

II. This Court Should Review Decisions Of The Federal Circuit Affecting International Trade Law.

When the Court of Appeals for the Federal Circuit ("CAFC") was created, commentators cautioned that it might become the "captive" of particular interests regularly appearing before the tribunal. A significant value of our Federal Judiciary, since its formation, has flowed from the fact that most of its judges have been "generalists" and, thereby, have shielded their decision-making from the special pleading of narrow interest groups. This Court's right and obligation to review the decisions of the Federal Circuit have been an important part of that tradition and a safety valve to assure the preservation of an even-handed process in the areas of the law in which the Federal Circuit is to exercise exclusive appellate jurisdiction.

Patent law is another significant specialty committed to the Federal Circuit's exclusive review. Since 1982, this Court has reviewed on average one Federal Circuit decision each year in that field. In fact, most decisions by this Court on patent law have been reversals of the views of the Federal Circuit. This history reflects the critical importance of the oversight by this Court of the exclusive jurisdiction of Federal Circuit in the areas of that court's competence.

This Court has not reviewed a single decision by the Federal Circuit that construes the U.S. trade (e.g., anti-dumping) statutes. The practice of non-review persists despite reports that, in its 20-year history, it is almost impossible to find a single decision of the Federal Circuit favorable to foreign parties claiming arbitrary or unjustified applications of the law to their businesses by the U.S. administrators. Ehrenhaft, *The Role of Federal Courts in U.S. Customs & International Trade Law,* The George

Washington Journal Of International Law And Economics, 323, 329 (No. 2, 1997-98). It is now time for this Court to exercise its oversight responsibilities and to accept a case in which it examines how U.S. trade law is implemented by the Executive Branch and is reviewed by the specialized courts Congress created to monitor the administration of these important statutes.

III. The Government's Other Claims are Contrary to the Statute and this Court's *Chenery* Decision.

Since it is conceded that Ta Chen used its best efforts to seek the data from the third-party (a customer) in issue after the DOC proceeding began and it was requested, the question is whether the courts below may give DOC authority not conferred by statute to impose penalty tariffs for failure to obtain data from a customer before its sale and before the investigative proceedings leading to the request for such data were even initiated. If the Court below had no right to expand the limited grounds for penalty tariffs set out in the statute, it is legally irrelevant to speculate whether sanctions were reasonable. Moreover, as the dissent explains, logic shows sanctions would have been unreasonable even if DOC had discretion to expand the new statutory scheme, because a duty to be prescient is unfair and unprecedented.[2]

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[2] *Cf. Pettibone v. United States*, 148 U.S. 199 (1893) (actions before proceeding began and request for information are not sanctionable); *Seabrook v. Stripling*, 736 F.2d 650, 654 (11th Cir. 1984) (sanctions not appropriate when third party refuses to cooperate). Moreover, research reveals no case allowing discovery sanctions where neither destruction of evidence nor refusal to seek it happened.

Ignoring the statutory focus on compliance with actual DOC requests for information, the Government merely argues that Ta Chen was on notice of what data to obtain from its then customer Sun at the time such data was allegedly available to Ta Chen, because Ta Chen was accused in 1994 by the private parties (i.e., the domestic industry) of being affiliated with Sun such that Sun's resale data should be provided, a claim Ta Chen denied. Gov't Br. at 4. As indicated, this argument is not relevant under the statutory scheme that focuses on when *DOC* requested the information.

In any event, as the Government admits, DOC never used this rationale to justify imposing penalty import duties on Ta Chen. Gov't Br. at 4, 6, 8. Rather DOC focused on when DOC itself first requested the data, as required by the statute. *Id.* It was the judges, not DOC, who came up with this rationale. The Government thereby acknowledges the lower courts' violation of this Court's rule in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that agency action must be defended in terms of the agency's stated rationale, not reasons supplied by overly helpful judges or counsel. It is undisputed that when *DOC* requested Sun's resale data, Sun's records were beyond Ta Chen's control and indeed Sun was closed. Petition App. 5a-6a, 10a-12a, 19a, 24a-29a, 33a-34a, 58a-59a, 66a.

CONCLUSION

Worldwide agreements lowering tariff and non-tariff trade barriers in order to promote world economic growth become meaningless if signatory nations fail to enact or to respect implementing legislation. Such agreements can be rendered equally meaningless if national courts "construe" implementing statutes to allow tariff raising under open ended standards. As Judge Gajarsa recognized in his dissent,

that is what will happen here, unless this Court exercises its supervisory authority to review and correct such judicial permissiveness.

Twenty years without review by this Court of U.S. trade laws have left the CAFC as the "Supreme Court" of trade law. The rules of law emerging from the WTO Uruguay Round necessitate that this Court remind the courts below that continued permissive deference to trade officials' discretion can eviscerate (a) efforts, including of the Congress, to impose a rule of law on international trade regulation and (b) key trade statutes designed to prevent selective reinstitution of high tariffs.

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